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No. 95-1353

In The

Supreme Court of the United States

October Term, 1995

FORT SUMTER TOURS, INC.,

Petitioner,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, the Petitioner, Fort Sumter Tours, Inc., respectfully submits this Reply to Respondent's Brief in Opposition ["Op. Cert."].

ARGUMENT

There is much common ground between Petitioner and the United States. It seems to be agreed that the proper construction of the National Park System Concessions Policy Act (CPA), 16 U.S.C. §§ 20-20g, is a question of some public interest and significance. Op. Cert. 1. The United States concurs that on the critical issue of whether the CPA authorizes the National Park Service (NPS) to unilaterally raise franchise fees for concession contracts already negotiated, the Fourth Circuit granted *Chevron* deference to the interpretation advanced by the agency. Op. Cert. 9. Respondent has also acknowledged that to the extent that NPS-48 is the source for the agency's position that it can unilaterally raise franchise fees, Op. Cert. 13, it is an informal guidance announcement not deserving of full judicial deference, Op. Cert. 9, an issue which has already secured the attention of two courts of appeal. *See Hotcaveg v. Kennedy*, 72 F.3d 133 (Table), 1995 WL 739991 (8th Cir. Dec. 15, 1995), cert. applied for March 14, 1996 (Docket No. 95-1480); *Lake Mohave Boat Owners Assoc. v. National Park Service*, 78 F.3d 1360, 1368 (9th Cir. 1996).

Despite these observations, the United States maintains that this case is unworthy of review because Petitioner agreed to concession language that seemingly permits NPS to unilaterally and dramatically raise franchise fees during the contract term, as occurred here.[1] That was not, however, the interpretation embraced by the agency at the time of contract. Prior to the adoption of NPS-48 on December 31, 1986, and amendments thereto in 1987, the agency itself interpreted the language appearing in section 9(e) of the concession contract as not granting NPS the authority to unilaterally force an increase in franchise fees. Most important, the court of appeals assumed in its decision that the agency had relied upon NPS-48 as the source of its authority, notwithstanding the agency's changed interpretation of the contract. See Pet. App. 14a.

Respondent's contention, moreover, misses the point of the Petition -- which is to place before this Court the question whether NPS ever had the statutory authority to unilaterally increase franchise fees in pursuance of a policy to limit concessioner profits. Petitioner's contention throughout has been that NPS simply arrogated that power, and did so chiefly by means of an internal guidance document, which (it was hoped by the agency) would avoid the public scrutiny of notice-and-comment and yet still command *Chevron* deference. The United States would apparently seek to promote this suspect form of agency law-making in this Court. Op. Cert. 9, 18.

[1] Respondent's suggestion, Op. Cert. 7, that Petitioner did not seek to discuss the fee increase with NPS is untrue. The Fourth Circuit noted there had been an exchange of letters on this point. See Pet. App. 3a.

NPS's extension of its regulatory power seems particularly egregious here since the agency was aware that it was operating beyond the orbit of its authority under the CPA. Somewhat ironically, it was the 1980 report of the Comptroller General (a previously unpublished document) that made this point clear to the agency by recommending that Congress should amend the CPA "to help improve the Park Service's ability to manage concessions operations." Op. Cert. 1a. Among the points to be cured by legislation was the authority of NPS to unilaterally raise franchise fees in order to limit concessioner profits. As this Court is well aware, the corrective legislation was never forthcoming and NPS decided on its own authority to achieve by guidance what was withheld from it by law, producing the events leading to this Petition.

If left unreviewed, this precedent will degrade the financial stability of National Park concessioners, diminish the quality of services available to park visitors, and give license to agency expansions of power unrestrained by effective judicial scrutiny.

CONCLUSION

For the foregoing reasons, along with those previously presented, the Petition should be GRANTED.

Respectfully submitted,

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